Public Prosecutor v Mohd Fahmi bin Hamzah

HIGH COURT (KUALA LUMPUR) — CRIMINAL TRIAL NO 45–40 OF 2000
AUGUSTINE PAUL J
27 MARCH 2002

Criminal Law — *Dangerous drugs — Trafficking — Accused seen throwing packet out of a window — Whether accused had custody and control of packet — Whether there was evidence to show that drugs were in the packet that the accused threw — Whether prosecution had made out a prima facie case against the accused — Dangerous Drugs Act 1952 s 39B(1)(a)*

Criminal Procedure — *Statement — Accused's statement to the police — Prosecution sought to introduce cautioned statement — Evidence of preconditions of admissibility necessary — Caution administered to accused — Whether evidence of precise words of caution that was administered had been adduced — Whether necessary for a trial within a trial*

The accused was charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') for trafficking in 306.2g of heroin and 212.3g of monoacetylmorphines, which offence was punishable under s 39B(2) of the Act. On the day in question, PW5 led a party of police officers to Room 409 in a hotel. PW5 unlocked the door to Room 409 with a duplicate key but was unable to enter the room as the door was latched from the inside. Through the gap of the partially opened door, PW5 saw a man throwing a packet out of the window. PW6, who carried out observation through the window of another room, saw a packet flying out of the window of Room 409 towards the roof of the adjoining building. When PW6 went to the roof, he saw two packets ('exh P9' and 'exh P11'). One packet was torn and small granular substances were scattered around. The other packet was in good condition. When PW5 broke open the door, he went towards the accused. PW5 stated that he then administered a caution to the accused and the accused admitted that the packet thrown out of the window was heroin. There were two other adults and a child in the room.

Held, acquitting and discharging the accused without calling for his defence:

(1) If it could be established that the person who threw the packet out of the window of Room 409 was in fact the accused, coupled with the other facts of the case, the accused could then be said to have custody and control of the packet. Only with such a finding could it then be presumed that the accused was in possession of the dangerous drugs contained in the packet that he threw and that he knew the nature of such drugs pursuant to s 37(d) of the Act. Further, in order to be sufficient to hold that a prima facie case had been made out in respect of exhs P9 and P11, there had to be further evidence to show that the exhibits were contained in the packet that the accused threw (see p 347C–F).

A (2) Based on the evidence adduced in the examination-in-chief and cross-examination of PW5, the person who threw the packet out of the window of Room 409 was in fact the accused. The act of throwing the packet coupled with the circumstances of the case were sufficient to show that the accused had custody or control of the packet that he threw (see p 348E).

B (3) In order to hold that there was a prima facie case against the accused, there must be evidence to link exhs P9 and P11 to the packet the accused had thrown. There was clear evidence to show that the accused threw only one packet out of the window. However, what was found on the roof of the other building were C two packets, namely, exhs P9 and P11. There had to be positive evidence to show that exhs P9 and P11 were contained in the packet thrown by the accused and there was no such evidence in the instant case. Further, one of the packets recovered was torn, with granular substances thrown around it. There was no evidence to show that the granular substances came out of that D particular packet. In the absence of such evidence, it had be shown that the torn packet contained sufficient drugs to constitute trafficking within the meaning of the Act. On the facts, there was no such evidence (see pp 348G–349B).

(4) It was not possible to amend the charge as submitted by the E prosecution to restrict it to just one packet recovered as the exact amount of drugs found therein had not been established. This was compounded by the fact that the evidence adduced did not show that the packet thrown by the accused did in fact land on the roof. The combined effect of PW5's and PW6's evidence was that the packet thrown by the accused went into the direction of F the roof but it did not mean that the packet landed there (see p 349B–C).

(5) Evidence of the contents of the packet thrown by the accused could have been furnished by the other two adults in the room, if they had been called as witnesses. Failure to call them as witnesses led to the inference that if they had been called, their evidence G would have been unfavourable to the prosecution. Therefore, the presumption contained in s 114(g) of the Evidence Act 1950 must be invoked against the prosecution (see p 349C–E).

(6) Where the prosecution seek to introduce a cautioned statement as part of its case, it must first adduce in evidence the relevant H preconditions of admissibility. Hence, there must be evidence of the precise words of the caution that was administered. There was no necessity to hold a trial within a trial to determine the admissibility of the statement made by the accused as the issue for determination, namely whether the absence of any evidence on the precise caution that was administered was sufficient I compliance with the law, was a pure question of law. In the instant case, the accused's statement was simply not admissible (see pp 350A, 351D–F, 352B–C).

(7) Accordingly, there was no evidence to link exhs P9 and P11 with the accused. Hence, the prosecution had failed to make out a prima facie case against the accused (see p 352G–H). A

[Bahasa Malaysia summary B

Tertuduh telah dituduh di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut') kerana mengedar 306.2g dadah heroin dan 212.3g monoacetylmorphines, kesalahan yang mana boleh dihukum di bawah s 39B(2) Akta tersebut. Pada hari yang dipersoalkan, PW5 telah mengetuai satu pasukan polis ke bilik 409 di sebuah hotel. PW5 C telah membuka pintu bilik 409 dengan kunci pendua tetapi tidak dapat memasuki bilik itu kerana pintu tersebut telah dikunci dari dalam. Melalui celah pintu yang terbuka sebahagian itu, PW5 nampak seorang lelaki membuang satu paket keluar tingkap. PW6, yang menjalankan pemerhatian melalui tingkap sebuah bilik lain, ternampak satu paket tercampak keluar dari tingkap bilik 409 ke arah D bumbung bangunan bersebelahan. Apabila PW6 pergi ke atas bumbung, beliau ternampak dua paket ('eks P9' dan 'eks P11'). Satu paket telah terkoyak dan butir-butir kecil bertaburan di sekitarnya. Paket yang satu lagi tidak koyak. Ketika PW5 memecah masuk, beliau telah mendapatkan tertuduh. PW5 menyatakan bahawa beliau telah memberikan amaran kepada tertuduh dan tertuduh telah mengaku E bahawa paket yang dibuang keluar tingkap itu adalah heroin. Ada dua orang dewasa lain dan seorang kanak-kanak di dalam bilik itu.

Diputuskan, membebaskan dan melepaskan tertuduh tanpa memanggil untuk pembelaannya: F

(1) Jika ianya dapat ditentukan bahawa orang yang membuang paket keluar tingkap bilik 409 adalah tertuduh, berserta dengan fakta-fakta lain kes tersebut, tertuduh boleh dengan itu diperkatakan mempunyai penjagaan dan kawalan paket tersebut. Hanya dengan keputusan sedemikian ianya boleh dianggapkan bahawa tertuduh mempunyai milikan dadah berbahaya yang terkandung G di dalam paket yang telah beliau buang dan bahawa beliau mengetahui sifat dadah tersebut selaras dengan s 37(d) Akta tersebut. Seterusnya, untuk melengkapkan keputusan bahawa satu kes prima facie telah dibuat berhubung dengan ekshibit-ekshibit P9 dan P11, haruslah terdapat keterangan selanjutnya H untuk menunjukkan bahawa ekshibit-ekshibit tersebut terkandung di dalam paket yang telah dibuang oleh tertuduh (lihat ms 347C–F).

(2) Berdasarkan keterangan yang dikemukakan di dalam pemeriksaan utama dan pemeriksaan balas PW5, orang yang membuang paket keluar dari tingkap bilik 409 adalah pada I hakikatnya tertuduh. Perbuatan membuang paket berserta dengan keadaan kes tersebut memadai untuk menunjukkan

A tertuduh mempunyai penjagaan atau kawalan akan paket yang telah beliau buang itu (lihat ms 348E).

(3) Demi untuk memutuskan bahawa terdapatnya kes prima facie terhadap tertuduh, haruslah terdapat keterangan untuk mengaitkan ekshibit-ekshbit P9 dan P11 kepada paket yang telah dibuang oleh B tertuduh. Terdapat keterangan yang jelas yang menunjukkan bahawa tertuduh hanya membuang satu paket keluar tingkap. Walau bagaimanapun, apa yang dijumpai di atas bumbung bangunan yang lain itu adalah dua paket, iaitu ekshibit-ekshibit P9 dan P11. Haruslah terdapat keterangan positif bagi menunjukkan bahawa ekshibit-ekshibit P9 dan P11 terkandung di C dalam paket yang dibuang oleh tertuduh dan tidak terdapat keterangan sedemikian dalam kes semasa. Lagipun, salah satu paket yang dijumpai telah koyak, dengan butir-butir bahan yang bertaburan di sekitarnya. Tidak terdapat keterangan untuk menunjukkan bahawa butir-butir bahan itu terkeluar dari paket tersebut. Dengan ketiadaan keterangan yang sedemikian, D haruslah ditunjukkan bahawa paket yang koyak itu mengandungi dadah yang mencukupi untuk membentuk maksud pengedaran di dalam lingkungan Akta tersebut. Berdasarkan fakta-fakta, tidak terdapat keterangan yang sedemikian (lihat ms 348G–349B).

(4) Adalah tidak berkemungkinan untuk meminda pertuduhan E tersebut sepertimana yang dihujahkan oleh pihak pendakwaan bagi menghadkannya kepada hanya satu paket yang dijumpai kerana jumlah sebenar dadah yang didapati di dalamnya masih belum ditetapkan. Ini telah diperburukkan oleh fakta bahawa keterangan yang dikemukakan tidak menunjukkan bahawa paket yang telah dibuang oleh tertuduh telah jatuh ke atas bumbung F tersebut. Kesan bersama keterangan-keterangan PW5 dan PW6 adalah bahawa paket yang telah dibuang oleh tertuduh menuju ke arah bumbung tetapi ianya tidak bermaksud bahawa paket itu telah jatuh di situ (lihat ms 349B–C).

(5) Keterangan mengenai kandungan paket yang dibuang oleh G tertuduh tentunya boleh diberikan oleh dua orang dewasa lain yang berada dalam bilik tersebut, jika mereka dipanggil sebagai saksi. Kegagalan untuk memanggil mereka telah menyebabkan inferens bahawa jika mereka dipanggil, keterangan mereka tentunya tidak memihak kepada pendakwaan. Oleh itu, tanggapan yang terkandung di dalam s 114(g) Akta Keterangan 1950 H mestilah digunakan terhadap pendakwaan (lihat ms 717C–E).

(6) Bila mana pihak pendakwaan cuba untuk membawa masuk kenyataan beramaran sebagai sebahagian dari kesnya, ianya mestilah pertamanya, mengemukakan keterangan pra-syarat boleh terima yang relevan. Oleh itu, haruslah terdapat keterangan I mengenai penggunaan perkataan-perkataan yang tepat ketika amaran tersebut dilakukan. Tiada keperluan untuk mengadakan satu perbicaraan di dalam perbicaraan untuk menentukan sama

ada kenyataan yang telah dibuat oleh tertuduh boleh diterima kerana isu untuk penentuan, iaitu sama ada ketiadaan sebarang keterangan atas ketepatan amaran yang telah dilaksanakan merupakan pematuhan undang-undang yang mencukupi, adalah suatu persoalan undang-undang yang tulen. Dalam kes semasa, kenyataan tertuduh tidak boleh diterima masuk (lihat mas 350A, 351D–F, 352B–C).

(7) Sehubungan itu, tidak terdapat keterangan untuk mengaitkan ekshibit-ekshibit P9 dan P11 dengan tertuduh. Oleh itu, pihak pendakwaan telah gagal untuk membentuk satu kes prima facie terhadap tertuduh (lihat ms 352G–H).]

Notes

For cases on Dangerous Drugs Act 1952 s 39B(1)(a), see 4 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 167–242.

For cases on statements generally, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3642–3655.

Cases referred to

Beh Chai Hock v Public Prosecutor [1996] 3 SLR 495 (refd)
PP v Kalaiselvan [2001] 2 MLJ 157 (refd)
PP v Neoh Wan Kee [1985] 1 MLJ 368 (refd)
PP v Ng Goh Weng & Anor [1979] 1 MLJ 127 (refd)
R v Mazerall (1946) 86 CCC 321 (refd)
Sabli bin Adin & Ors v Public Prosecutor [1978] 1 MLJ 210 (refd)
Shamsuddin bin Hassan & Anor v Public Prosecutor [1991] 3 MLJ 314 (refd)
Sinclair v R (1946) 73 CLR 316 (refd)

Legislation referred to

Criminal Procedure Code ss 37A, 113, (1)(a)(ii)
Dangerous Drugs Act 1952 ss 37(d), First Schedule
Evidence Act 1950 s 114(g)

Appeal from: Arrest case No A83–478 of 2000 (High Court, Kuala Lumpur)

Shahrulrizal bin Majid (*Sharlyza bte Sharkawi* with him) (Deputy Public Prosecutors, AG's Chambers) for the prosecution.

Selvam Shanmugam (*RS Seelan* with him) *(Selvam Shanmugam & Partners)* for the accused.

Augustine Paul J: The charge preferred against the accused is as follows:

> Bahawa kamu pada 6 Mei 2000 jam lebih kurang 2 petang di Bilik No 409, City Park Hotel, Lorong Haji Husin Satu, Off Jalan Raja Muda, Kuala Lumpur, Wilayah Persekutuan telah mengedar dadah berbahaya laitu 518.5g

> campuran heroin dan monoacetylmorphines (306.2g heroin dan 212.3g monoacetylmorphines) dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah s 39B(2) Akta yang sama.

He claimed trial. The prosecution called a total of eight witnesses in support of its case.

On 6 May 2000, Chief Inspector Ahmad Radzi bin Hussain ('PW5') led a party of police officers to room No 409 ('Room 409'), City Park Hotel, Kuala Lumpur ('the hotel') to conduct a search for dangerous drugs. He directed some of the officers to position themselves near the hotel while he and Detective Corporal Razali bin Md Kassim ('PW6') went up to the fourth floor of the hotel. He found the door of Room 409 locked. Through a window in front of room No 410 ('Room 410'), they noticed that the window of Room 409 was open. PW5 then obtained the duplicate key of Room 409 from the hotel staff. He then went back to Room 409 with PW6 and some other officers. He instructed PW6 to carry out observation through the window in front of Room 410. The other police officers remained with him. He then knocked at Room 409 and shouted 'Police! Police! Police!'. However, the door was not opened. As PW5 said:

> Saya seterusnya menggunakan anak kunci pendua untuk buka bilik 409. Setelah pintu dibuka saya dapati pintu bilik 409 berkunci menggunakan penyelak. Melalui ruang pintu yang terbuka sedikit saya lihat seorang lelaki tidak berbaju memakai kain sarung batik melompat di atas katil di tepi tingkap membaling sesuatu. Pada masa yang sama, saya dengar D/Kpl Razali menjerit 'Ada orang baling barang keluar'. Saya memecahkan pintu tersebut dan menerkam ke arah lelaki yang tidak berbaju tersebut di atas katil tepi tingkap. Anggota lain mengikut saya masuk ke dalam bilik.
>
> Di dalam bilik itu, terdapat empat orang penghuni. Yang pertama Mohd Fahmi iaitu tertuduh, seorang lagi lelaki, seorang perempuan dan kanak-kanak. Mohd Fahmi dalam kandang. OKT dicamkan. Seorang lelaki lain ialah Syamsaari. Nama perempuan ialah Sarina. Kanak-kanak ialah anak tertuduh. Sarina dicamkan. (Syamsaari berada di penjara). Selepas saya menerkam ke arah tertuduh, saya dengan dibantu oleh D/Kpl Mohd Nor dan D/Kpl Ahmad bin Latif menangkap tertuduh. Berlaku sedikit pergelutan. Tertuduh cuba mengelak dari ditangkap. Saya kemudiannya membacakan kata-kata amaran kepada tertuduh. Saya baca secara lisan. Saya mengeluarkan kata-kata amaran secara lisan kepada tertuduh.

PW5 searched the room and discovered two packets containing traces of a substance suspected to be heroin. He marked them as C and D (exhs P17 and P18). PW5 instructed PW6 to go up the roof of the adjoining building through the window in front of Room 410. He then went to the roof of the other building himself together with the accused, Syamsaari and some police officers. PW5 then said:

> Di atas bumbung, D/Kpl Razali telah menunjukkan kepada saya satu bungkusan yang telah pecah mengandungi ketulan putih yang disyaki dadah heroin dan satu lagi bungkusan mampat berbalut surat khabar. Di dalamnya berbalut masking tape warna hijau. Di dalamnya terdapat ketulan berwarna putih disyaki heroin.

PW5 marked both the packets as A and B (exhs P9 and P11 and the newspaper wrapping is exh P8). Later, he handed the exhibits and the accused to Chief Inspector Rasidi bin Ab Rashid ('PW8'), the investigating officer. In his cross-examination regarding the arrest of the accused, PW5 said: A

> Melalui sedikit ruang saya nampak tertuduh melompat ke atas katil berhampiran tingkap dan membaling sesuatu keluar. Semasa saya nampak cuma seorang di atas katil ... Walaupun pandangan terhad, saya nampak tertuduh melompat dan baling sesuatu. B

In testifying on what the accused threw, he said:

> Tertuduh membuang sesuatu. Saya cuma nampak tertuduh baling sesuatu dan saya tidak pasti apa barang yang dibaling oleh tertuduh. ... Saya tak dapat nampak mana barang itu jatuh. C

Upon cross-examination on his interrogation of the accused PW5 said:

> Saya seterusnya mengeluarkan kata-kata amaran dan mengarahkan D/Kpl Ahmad bin Latif menggari tertuduh. Saya tanyakan kepada tertuduh apakah barang yang dibaling oleh tertuduh. Tertuduh menjawab barang itu heroin. ... Saya tidak setuju tertuduh tidak kata barang yang dibuang itu adalah heroin. Saya tidak bersetuju tertuduh tidak mengaku dia tidak membuang sesuatu. D

PW6 said in his evidence that from where he was positioned, he saw a packet flying out from the window of Room 409 in the direction of the roof of the other building. He then shouted to PW5 saying that somebody had thrown something. As PW6 said: E

> SP5 kemudiannya telah mengarah saya untuk panjat ke bumbung bangunan bagi mengenalpasti apakah barang itu. Apabila saya sampai di atas bumbung itu, saya nampak satu bungkusan yang pecah, di mana berterabur ketulan-ketulan kecil bahan berwarna putih dan satu lagi bungkusan masih dalam keadaan baik. Selain dari bungkusan-bungkusan ini, tidak ada bungkusan-bungkusan lain di bumbung, ... Saya kemudiannya menunjukkan kepada SP5 kedudukan kedua-dua bungkusan itu. SP5 telah bertanyakan kedua suspek beberapa soalan. SP5 kemudiannya mengambil kedua-dua bungkusan tersebut. F

G

PW8 sent exhs P9, P11, P17 and P18 to the Chemistry Department for analysis. Ismail bin Talib ('PW3'), a chemist attached to the Chemistry Department, confirmed that upon analysis, he found exh P9 to contain 178.7g of heroin, 31.1g of monoacetylmorphine and 122g of morphine while exh P11 contained 127.5g of heroin, 22.6g of monoacetylmorphine and 90.3g of morphine. He said that these drugs are listed in the First Sch to the Dangerous Drugs Act 1952 ('the Act'). Zulkefli bin Mohd Edin ('PW4'), also a chemist, analyzed exhs P17 and P18. He found them to contain traces of heroin, monoacetylmorphine and morphine. H

At the close of its case, the prosecution offered to the defence, Detective Sergeant Othman, Detective Corporal Mohd Nor, Detective Corporal Mustafa, Detective Corporal Ahmad bin Latif, Lance Corporal Arshad, Chief Inspector Fisol, Syamsaari, Sarina, Nor Alina and Faridah. I

Learned counsel for the defence said that he will not be calling them as witnesses.

The defence submitted that the prosecution has not made out a prima face case while the prosecution submitted that it had done so. Having considered the submissions of both parties, it is my view that the following issues require deliberation:

(i) whether the person who threw the packet out of the window of Room 409 is in fact the accused;

(ii) whether the packet that was thrown out of the window of Room 409 did in fact contain exhs P9 and P11; and

(iii) whether the statement made by the accused to PW5 is admissible.

If it can be established that the person who threw the packet out of the window of Room 409 is in fact the accused then, coupled with other facts of the case, he can be said to have had custody and control of it. In support, I refer to *Shamsuddin bin Hassan & Anor v Public Prosecutor* [1991] 3 MLJ 314 where the (then) Supreme Court expressed the view that a person actually seen throwing a bundle out of a car is sufficient to show that he had control or custody of the bundle. With such a finding, it can then be presumed that the accused was in possession of the dangerous drugs contained in the packet that he threw and to have known the nature of such drugs pursuant to s 37(d) of the Act. Such evidence, in order to be sufficient to hold that a prima facie case has been made out in respect of exhs P9 and P11, must be supported by further evidence to show that the exhibits were in fact contained in the packet that the accused threw out of the window of Room 409. This is logical as the absence of such evidence will not show that the packet that was thrown out of the window contained dangerous drugs recovered. If there is no such evidence, the statement made by the accused to PW5, if admissible, will show by inference that exhs P9 and P11 were in fact thrown out of the window by the accused.

I will now consider the three issues that I have identified earlier.

(i) Whether the person who threw the packet out of the window of Room 409 is in fact the accused

The identity of the accused as the person who threw the packet is based solely on the evidence of PW5. In his examination-in-chief, he said that he saw a male person who was wearing only a sarung throwing something out of the window. When he broke open the door, he went towards this person. He then said that he went towards the accused and arrested him. It must be observed that there was another male person in the room at that time. The evidence by PW5 that he went towards the accused and arrested him may raise some doubts as to whether the person whom he arrested was in fact the person who was clad only in a sarung and who was the person who threw the packet out of the window. Be that as it may, whatever doubts there may be as to the identity of the person who threw the packet out of the window was resolved by evidence adduced in the cross-examination of PW5. In answer to questions, he stated emphatically that it was the accused who threw something out of the window. I pause to note that evidence adduced in cross-examination is equally admissible and relevant as evidence adduced in examination-in-chief even if it goes against the cross-examining party. It is perhaps worth mentioning that the art of cross-examination must be handled with the most scrupulous care. As Wigmore said:

> The cross-examiner may already know what is there waiting for disclosure. But if he does not, he is faced by a contingency. He may extract the most confirming circumstances for the proponent's own case, which have somehow been left unnoticed. He may demonstrate that the credit of the witness is greater, not less, than was supposed. The great axiom, then, of the art of cross-examination, as dependent in theory, is that it is a contingency whether the fact that will actually be extracted will be favourable or unfavourable to the cross-examiner's purposes. It is here that the art (that is, the technical skill) of cross-examination enters. On this hang all the lesser rules of the art. Hence, it is that it must call to its aid so many other elements than mere knowledge of law. Experience of human nature, judgment of chances, knowledge of the case, tact of manner — all these things and more, have to do with the art. Yet the theory of the process underlies and influences at every point. To cross-examine — that is the fundamental question, which springs from the essential nature of the process and arises anew for every part of every witness' testimony. The greatest cross-examiners have always stated this as the ultimate problem.

I am satisfied, based on the evidence adduced in the examination-in-chief and cross-examination of PW5, that the person who threw the packet out of the window of Room 409 is in fact the accused. The act of throwing the packet coupled with the circumstances of the case is sufficient to show that the accused had custody or control of the packet that he threw. The use of this evidence to activate the presumption contained in s 37(d) of the Act in respect of exhs P9 and P11 is dependent on the answer to the next issue.

(ii) Whether the packet that was thrown out of the window of Room 409 did in fact contain exhs P9 and P11

The subject matter of the charge against the accused is exhs P9 and P11. In order to hold that there is a prima facie case against the accused, there must be evidence to link these exhibits to the packet that he threw. Such evidence is dependent on the testimony of PW5 and PW6. PW5 saw the accused throwing something out of the window. PW6 saw a packet flying out of the window in the direction of the roof of the other building. When he went to the roof of the building, he saw two packets (exhs P9 and P11). One was torn with small granular substances scattered around. The other packet which was found some distance away was in good condition. There were no other packets on the roof. There is clear evidence to show that the accused threw only one packet. What was found on the roof were two packets with some granular substances scattered around. There must be positive evidence to show that these items were contained in the packet that the accused threw. PW6's evidence shows that apart from the packets recovered, there were no other packets there. That, however, does not indicate that there were no packets on the roof before PW6 arrived there. Thus, there is no evidence to show that exhs P9 and P11 were contained in the packet that the accused threw. This is significant as the accused threw only one packet and one of the packets recovered was torn with scattered granular substances. There is no evidence to show that these granular substances came out from that particular packet. In the absence of such evidence, it must be shown that the packet contained, if any, sufficient drugs to constitute trafficking within the meaning of the Act. There was no such evidence. Thus, it is not possible to amend the charge, as submitted by the prosecution, to restrict it to just one of the packets recovered, as the exact amount of drugs found in one of the packets has not been established. This is compounded by the fact that the evidence adduced does not show that the packet thrown by the accused did in fact land on the roof. The combined effect of the evidence of PW5 and PW6 is that the packet thrown by the accused went in the direction of the top of the roof. That does not mean that it landed there. Evidence on the contents of the packet that the accused threw could have been furnished by Syamsaari or Sarina, if they had been called as witnesses. They are witnesses who could have unfolded the narrative upon which the prosecution case is based in light of the unsatisfactory features on which the prosecution rested its case. Failure to call them as witnesses leads to the inference that if they had been called, their evidence would have been unfavourable to the prosecution. The corollary is that the presumption contained in s 114(g) of the Evidence Act 1950 must be invoked against the prosecution. In the circumstances, I am unable to hold that the exhibits recovered from the roof came from the packet thrown by the accused. This finding is sufficient to hold that the prosecution has failed to make out a prima facie case unless it can be established that the statement made by the accused to PW5 is admissible.

(iii) Whether the statement made by the accused to PW5 is admissible

In his examination-in-chief, PW5 said that he administered a caution to the accused. But he did not go on to give any evidence of any statement that was made consequently by the accused. However, in his cross-examination, PW5 said that in answer to his question as to what was the thing that the accused threw, the accused said that it was heroin. He denied that the accused did not make such a statement. If this evidence is admissible, it is clear that what the accused threw is heroin. It can be safely then inferred that what was recovered was what the accused threw. The admissibility of the statement requires a consideration of the law relating to a statement made to a police officer by an accused person pursuant to s 37A of the Act which is similar to s 113 of the Criminal Procedure Code ('the CPC'). In his submission, learned counsel for the accused contended that PW5 merely said that he administered the caution. There is no evidence of the exact caution that was administered. In the absence of such evidence learned counsel, in referring to *PP v Kalaiselvan* [2001] 2 MLJ 157, said that the statement is not admissible. The learned deputy public prosecutor contended that the defence did not challenge the caution that was administered nor was it suggested that it was insufficient. He added that the fact that it was not challenged means that the caution must be deemed to have been properly administered.

I agree with the learned counsel that there must be evidence of the precise words of the caution that was administered. Evidence of the words of the caution that was administered is a statutory pre-condition to the admissibility of a cautioned statement. Sections 37A of the Act and 113(1)(a)(ii) of the CPC explicitly provide that a cautioned statement made by a person after his arrest shall not be admissible in evidence unless the court is satisfied that a caution was administered to him in the following words or words to the like effect:

> It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence.

The requirement that the court must be satisfied that a caution was administered ' ... in the following words or words to the like effect ...' is a statutory direction to the court to ensure that the prescribed caution has been administered. This means that there must be evidence of the caution that was administered. In the absence of such evidence, the court will not be able to rule whether the prescribed caution or words to the like effect were administered. Thus, the actual words of the caution that was administered must be adduced in evidence. This is significant as the caution enshrines certain in-built rights like, for instance, the right of silence. It is therefore important to ensure that these rights have been properly communicated to an accused person. In the circumstances, a mere statement that a caution was administered is insufficient. Be that as it may, what is of wider significance is whether a trial within a trial is required before a ruling can be made in a case, such as this, where there is no evidence of the caution that was administered.

It is settled law that in order to determine the admissibility of a cautioned statement, a trial within a trial must be held. Thus, in *Sabli bin Adin & Ors v Public Prosecutor* [1978] 1 MLJ 210, the Federal Court took serious objection to reliance on statements based on written submissions on their admissibility without holding a trial within a trial. This, to my mind, is only a general view of the law. In dealing with the circumstances in which a trial within a trial must be held to determine the admissibility of a cautioned statement, Yong Pung How CJ said in *Beh Chai Hock v Public Prosecutor* [1996] 3 SLR 495 at p 501:

> In my opinion, the trial judge made a serious error of law when he failed to hold a voir dire to resolve the issue of the identity of the recorder of the statement. The trial judge's mistake was in thinking that voir dire need only be conducted when the question of the voluntariness of a confession is raised. The true position is that the procedural safeguard of a voir dire is necessary whenever the admissibility is challenged, provided that the dispute over the admissibility of a confession is not confined to a pure point of law, but is one which requires the calling of evidence of the accused person and other witnesses in support of or against the admissibility of the confession. The

> question of this voluntariness of a confession is but one aspect of its admissibility.

Sinclair v R (1946) 73 CLR 316 is authority for the proposition that a trial within a trial will not be necessary when, although the admissibility of evidence is challenged, a finding of preliminary fact is not required. In *R v Mazerall* (1946) 86 CCC 321, the Ontario Court of Appeal specifically made the point that there is no need to hear witnesses in a trial within a trial when the facts are not substantially in dispute and admissibility can be determined by applying the rules of evidence. It follows that where the admissibility of a cautioned statement is confined to a pure question of law, a ruling can be made without the need to hold a trial within a trial. This is for the obvious reasons that there are no issues of fact to be tried. To proceed to hold a trial within a trial in such a situation is a complete waste of judicial time. In this regard, useful reference may be made to *Public Prosecutor v Ng Goh Weng & Anor* [1979] 1 MLJ 127 where Suffian LP said that if a statement had been made to a police officer below the rank of inspector, 'then the duty of the magistrate was easy — he could simply reject it' (at p 129).

The resultant matter for consideration is whether a trial within a trial is necessary to rule on the admissibility of the statement made by the accused. The administration of a caution is a statutory pre-condition of admissibility of a cautioned statement and is, generally, a question of law. But it need not remain so in all cases. It can also evolve into a question of fact. This will arise when the administration of the caution is disputed by the accused or when the dispute is as to the precise words that were administered. In such event, there being a dispute on the proper administration of the caution, a trial within a trial must be held to determine the issue as a ruling can be made only after hearing witnesses. The only issue for determination in this case is whether the absence of any evidence on the precise caution that was administered is sufficient compliance with the law. That is a pure question of law. In the circumstances, it is not necessary to hold a trial within a trial to determine the admissibility of the statement that was made by the accused. It is simply not admissible. If the prosecution had wanted the statement made by the accused admitted in evidence, the required evidence on the caution ought to have been elicited from PW5 in his re-examination, though properly, it ought to have been done so in his examination-in-chief. If that had been done, I am confident that learned counsel would have applied for a trial within a trial as he had already challenged PW5 on the making of the statement by the accused. In the absence of any evidence having been adduced on the caution that was administered, it was indeed a sagacious and strategic move by learned counsel to have remained silent and raise the issue of the caution as a point of law. The submission by the prosecution that the fact that PW5's evidence on the administration of the caution was not challenged means that it must be deemed to have been properly administered cannot be sustained. It must be immediately observed that the evidence adduced by the prosecution was only that a caution was administered and not that it was properly administered. The latter is a matter for the prosecution to establish. There is no obligation on the defence to mount a challenge to a matter on which no evidence has been led. Thus, the question of acceptance of a fact for a lack of cross-examination on it does not arise for the obvious reason that there was nothing to cross-examine. Contrary to the further submission of the prosecution, the fact that the statement made by the accused was adduced in evidence at the instance of the defence does not mean that the pre-condition of its admissibility can be dispensed with. In *Public Prosecutor v Neoh Wan Kee* [1985] 1 MLJ 368, Edgar Joseph J (as he then was) said that evidence of statements made by the accused to a police officer sought to be adduced in evidence by the defence, for which a trial within a trial is not necessary, is not admissible in the absence of any evidence having been led to show that a caution was administered. I pause to add that where the prosecution is seeking to introduce a cautioned statement as part of its case, it must first adduce in evidence the relevant pre-conditions of admissibility. Evidence must be led to show that the officer to whom the statement was made was of the rank of inspector and above, that the required caution was administered with evidence of the words of the caution, and that the statement was made voluntarily. It is at this stage that the defence may object to the admissibility of the statement in which event a trial within a trial must be held. In this regard, I consider it pertinent to refer to a well researched and instructive book entitled *Criminal Procedure* by Francis Ng Aik Guan where the learned author says at p 121:

> Where the PO intends to introduce the accused's statement as a part of the prosecution case, then he has to call the RO as a prosecution witness at some point in its case for that purpose. The RO will be asked to take an oath or be affirmed when he enters the witness box. He will then be examined-in-chief by the PO who will ask him various questions to show due compliance with the requirements for admissibility such as the requisite rank, the proper and due administration of the caution if required and the absence of any vitiating factors such as involuntariness. Thereafter, the PO will produce the statement and show it to the RO for identification.
>
> At that juncture, the defence counsel will invariably object to the admissibility of the accused's statement, especially where its contents are highly incriminating. In the absence of any objection, the statement will be admitted and marked as a prosecution exhibit ('P ... ') upon being identified by the RO. Where objection is raised, the main trial will be suspended and the court will embark on a trial within a trial (TWT or sometimes referred to as a 'voir dire') to determine the admissibility of such statement.

The result of my ruling on issues (ii) and (iii) is that there is no evidence to link exhs P9 and P11 with the accused. In the upshot, it is my finding that the prosecution has failed to make out a prima facie case against the accused. Accordingly, I acquit and discharge him without calling upon him to enter his defence.

Accused acquited and discharged without being called for his defence.

Reported by Lim Lee Na